Supreme Court, U.S.
FILED
APR 1 1992
OFFICE OF THE CLERK

(2)

NO. 91-1494

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK O. GUNTER, et al.,

Petitioners,

vs.

SHAKUR ABDULLAH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

David A. Barron

CLINE, WILLIAMS, WRIGHT,
JOHNSON & OLDFATHER
Attorneys at Law
1900 FirsTier Bank Bldg.
Lincoln, NE 68508
(402) 474-6900
Attorneys for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the Eighth Circuit Court of Appeals err when it held that the District Court had abused its discretion by failing to appoint an attorney for the plaintiff in this civil rights case?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

A. THERE ARE NO IMPORTANT OR SPECIAL REASONS FOR GRANTING A WRIT OF CERTIORARI 1

B. THE COURT OF APPEALS PROPERLY APPLIED THE ABUSE OF DISCRETION STANDARD IN REVERSING THE DISTRICT COURT 2

CONCLUSION 6

TABLE OF AUTHORITIES

In Re Lane
801 F.2d 1040 (8th Cir. 1986) 4,6

Johnson v. Williams,
788 F.2d 1319 (8th Cir. 1986) 4,6

Kern v. TXO Production Corp.,
738 F.2d 968 (8th Cir. 1984) 2

Mallard v. United States District Court for Southern District of Iowa,
490 U.S. 296 (1989) 4

Nelson v. Redfield Lithograph Printing,
728 F.2d 1003 (8th Cir. 1984) 6

Turner v. Safely,
482 U.S. 78 (1987) 3,5

Wiggins v. Sargent
753 F.2d 663 (8th Cir. 1985) 4

STATEMENT OF THE CASE

Respondent generally agrees with petitioners' statement of the case. However, clarification is necessary. First, there is no evidence that respondent is "a veteran litigator." Petition for Writ of Cert. at 4. Nor is there any evidence of what discovery may have been conducted by respondent. Finally, the record contains no evidence that petitioners offered to waive a jury trial.

What the record shows is that respondent, a non-lawyer inmate, was forced to investigate the factual and legal elements of his First Amendment, equal protection, and due process claims, respond to a summary judgment motion filed and briefed by attorneys for petitioners, prepare witnesses, legal arguments and jury instructions and conduct a three-day jury trial alone while petitioners were represented at all times by two attorneys.

After a defendants' verdict, the Eighth Circuit appointed counsel to represent respondent on appeal. Employing the legal analysis it had previously adopted and applied on numerous occasions, the court determined that, given the factual circumstances of this particular case, the district court abused its discretion by not appointing counsel at respondent's request. Given the inherently factual nature of that determination, petitioners' request for rehearing *en banc* was understandably denied.

REASONS FOR DENYING THE WRIT

A. THERE ARE NO IMPORTANT OR SPECIAL REASONS FOR GRANTING A WRIT OF CERTIORARI.

Nothing contained in the Petition for Writ of Certiorari demonstrates an important or special reason for granting the Writ. The decision by the court of appeals was highly

fact dependent. Hence, the decision cannot be said to conflict with decisions from other circuit or state courts. This appeal reflects nothing more than petitioners' dissatisfaction with the application of a flexible standard used to determine when counsel should be appointed. The standard, which was discussed and relied upon by the three-judge panel below, was termed "not objectionable" by petitioners. Petition for Writ of Cert. at 7. A review by this Court of the application of that standard to the facts in this particular case will serve no purpose beyond the confines of this case. This Court cannot, and should not, review every decision appointing or refusing to appoint counsel. For that reason, the Writ should be denied.

B. THE COURT OF APPEALS PROPERLY APPLIED THE ABUSE OF DISCRETION STANDARD IN REVERSING THE DISTRICT COURT.

Petitioners' primary argument is that the decision to appoint counsel is within the sound discretion of the district court; therefore, the appellate court has no authority to review or question that decision. Deference, however, does not mean blind adherence. The court of appeals may intervene when it detects an abuse of discretion. *Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984). The three-judge panel properly applied the abuse of discretion standard, and concluded that the district court had abused its discretion in denying counsel. There is nothing so important or special about that decision that requires consideration by this Court.

The court of appeals reached its conclusion after a careful analysis of the elements relevant to this issue.[1] The Eighth Circuit's opinion noted that the First Amendment

[1]That analysis encompasses three pages of the court's opinion. The district court's decision, on the other hand, contains no analysis or explanation for its denial of counsel, only a recitation of the applicable legal standard, and the statement, "Applying these considerations, I shall deny plaintiffs' request for appointment of counsel in this matter." Petition for Writ of Cert. at App. 26.

issue in this case (the validity of a prison policy prohibiting the plaintiff from fulfilling his holy obligation of Zakah) involved an analysis of several factual and legal elements set forth in the case of *Turner v. Safley*, 482 U.S. 78 (1987): (1) Whether the policy possesses a valid connection with the legitimate, neutral governmental interest used to justify it; (2) whether other avenues exist for the free exercise of religion, including the practice of Zakah; (3) the impact on the prison of accommodating the religious right; and (4) the availability of feasible, ready alternatives. Obviously, extensive balancing between the various elements must take place, and the plaintiff bears the burden of convincing the trier of fact that when all the factors are considered, the plaintiff's rights outweigh the interests expressed by the prison officials. The court of appeals correctly determined that this case is both factually and legally complex.

The Eighth Circuit specifically noted that evidence regarding the extent to which prison policy actually controlled the flow of inmate funds, as well as further evidence regarding the impact of allowing the requested practice and the existence or absence of ready alternatives, would have been extremely helpful in deciding this case under the *Turner* analysis. Furthermore, there were exceptions to the challenged regulation, allowing certain limited payments to be made from the Inmate Trust Fund. Evidence regarding the adoption, interpretation, and enforcement of those exceptions could be critical.

Furthermore, petitioners determined that it was difficult to create a religious exemption to the regulation with sufficient particularity to withstand a due process challenge. Under *Turner*, one challenging a policy has some burden to propose a workable regulation that would pass constitutional muster in light of previous court

decisions. How can it be expected that an indigent prisoner with no legal training could prepare a workable exemption when the trained prison officials claim to have encountered serious difficulties in trying to do so? *Cf. Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 1985) (court asked to determine validity of purported religion).

It is also important to remember the critical nature of jury instructions in any case tried to a jury. Those instructions are the statement of law upon which the jury must reach its decision. The preparation of adequate jury instructions generally requires extensive factual and legal research and analysis. In addition, the preservation of any claimed errors with respect to the requested instructions requires a complete understanding of the applicable procedural rules. It is not unusual to see even a trained lawyer inadvertently waive potential errors on appeal by not asserting the appropriate objections to particular instructions. The fact that this case was tried to a jury also weighs in favor of the need for counsel.

Petitioners also argue that the court's decision will unreasonably burden members of the bar, who often perform services without compensation and who may be less than willing to perform as appointed counsel. As the Eighth Circuit correctly observed in *Johnson v. Williams*, 788 F.2d 1319, 1322 n.2 (8th Cir. 1986), it is improper to consider such facts in determining whether counsel should be appointed in any particular case. *See also In Re Lane*, 801 F.2d 1040, 1044 n.2 (8th Cir. 1986) (re lawyers' ethical obligation to represent indigent inmates). The potential burden on attorneys is irrelevant. Moreover, since no attorney can be compelled to represent an indigent litigant in a civil rights case, *Mallard v. United States District Court for Southern District of Iowa*, 490 U.S. 296 (1989), it cannot logically be said that attorneys are unreasonably

burdened if they voluntarily accept an appointment.

Petitioners' purported concern for members of the bar is betrayed by their argument that the decision to appoint counsel "unfairly penalizes defendants" who are held liable for attorney's fees.[2] That argument, like the previous one, has no relevance to the issue of whether counsel should be appointed to represent an indigent civil rights plaintiff. Fees are awarded only in those cases where the plaintiff proves that the defendants violated his or her constitutional rights. Those fees are awarded regardless of whether the plaintiff's attorney was appointed or chose to represent the plaintiff in the "free enterprise market economy" trumpeted by petitioners. Petition for Writ of Cert. at 17. The potential award of legislatively authorized attorney's fees against one who has violated another's constitutional rights has no bearing on the decision to appoint counsel.

Petitioners have distorted the true impact of the appellate court's decision. Nowhere is that more clear than in their statement of the first issue presented for review:

> Is it a proper exercise of the supervisory authority of a Court of Appeals for such court to order the appointment of counsel for indigent inmates in all actions brought under 42 U.S.C. § 1983 which involve jury trials, First Amendment issues, or analysis under *Turner v. Safley*, 482 U.S. 78 (1987)?

Petition for Writ of Cert. at i. The issue here is whether the court erred in this case, not in a broad array of cases. The present case does not involve only one of the above-noted elements, but rather involves all elements. The court of appeals determined that in this case the combination of all those elements required the appointment of counsel.

Nor did the appellate court hold, as petitioners stated in their Petition for Writ of

---

[2]Attorney's fees are expressly authorized by 42 U.S.C. § 1988.

Cert. at 16, that district courts must appoint counsel "in all cases which are not patently frivolous." To the contrary, the court relied upon the standard that petitioners admit is appropriate, and applied that standard to the facts of this case. Petitioners should not be allowed to distort this decision into evidence of a "practice" of appointing counsel in all cases.

Nothing within the appellate court's opinion is contrary to any statutory provisions or any earlier pronouncements by this Court or any other court. The Eighth Circuit properly applied the standard first stated in *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984), and later discussed in *Johnson v. Williams*, 788 F.2d 1319 (8th Cir. 1986) and *In Re Lane*, 801 F.2d 1040 (8th Cir. 1986). The decision of the court of appeals was correct, and does not require further reconsideration. Applying the considerations contained in Rule 10 of the Rules of the Supreme Court of the United States, this case is not worthy of review on certiorari.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to deny the Petition for Writ of Certiorari.

SHAKUR ABDULLAH, Respondent

By: CLINE, WILLIAMS, WRIGHT,
JOHNSON & OLDFATHER
Attorneys at Law
1900 FirsTier Bank Bldg.
Lincoln, NE 68508
(402) 474-6900

By David A. Barron
David A. Barron